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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. [redacted] 155

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF BY THE PETITIONER.

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No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Q. W. S. S. Realty and Investment Company, a corporation, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on the 9th day of April, 1946 in the case lately pending in said Circuit Court of Appeals, entitled United States of America, Appellant, versus Q. W. S. S. Realty and Investment Company, a corporation, Appellee, bearing number 13226 of the causes on the docket of said Circuit Court of Appeals,

reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of this petitioner and against said respondent, which said judgment of the said Circuit Court of Appeals became final on the 30th day of April, 1946 by the overruling by that Court of petitioners' petition for rehearing of said cause.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals in the above mentioned case (R. 295-296) recites that said cause is ruled by the opinion of said Court entered the same day in the case of Lola Castle Oliver and A. Ray Oliver, her husband, and [illegible] Candio, Appellants, vs. United States of America, Appellee, bearing Circuit Court of Appeals number 13174 (R. 297-303), a case arising out of the same land acquisition project involved in this case and involving identical questions of law. It is therefore not only the opinion in the case at bar but the opinion in the aforesaid Oliver case, which set forth the principles upon which this case was decided by the Circuit Court of Appeals, that petitioners here seek to have reviewed. Neither the Circuit Court of Appeals' opinion in this case No. 13226 nor in the aforesaid Oliver case, No. 13174, has yet been reported but the opinion in this case may be found beginning on page 295 of the transcript of the printed record filed herewith and the opinion in the aforesaid Oliver case appears in said transcript of the record beginning on page 296 thereof.

SUMMARY STATEMENT.

This suit is a condemnation suit against this petitioner and its tract of land known as tract No. 174 and alleged to contain 356.51 acres of land in St. Charles County, Missouri, for the acquisition of fee simple title to said land

by the United States for use by the War Department as a site for a T.N.T. manufacturing plant (R. 63-74). The petition was filed April 9, 1941 (R. 63). The petition alleged that the action was brought pursuant to the order of the Secretary of War under authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C., Sec. 257, as amended) and pursuant to the authority of the Act approved July 2, 1917, Title 50, U. S. C., Sec. 171, as amended, and of certain appropriating acts.

The aforesaid Act of August 1, 1888 (25 Stat. 375; 45 U. S. C., Sec. 257) was amended by the Act of Feb. 26, 1931 (46 Stat. 1421) commonly known as the Declaration of Taking Act. The petition in its prayer prays for an order under this last mentioned act "decreeing to the plaintiff the right to take immediate possession of said lands * * *" (R. 73). The aforesaid Declaration of Taking Act (46 Stat. 1421), Title 40 U. S. C., Sec. 258 (a), specifically provides for the payment of interest on delayed payments in condemnation cases.

A Declaration of Taking as to this land and other land had been filed by the United States on April 7, 1941 in case No. 770 in the District Court (R. 74). This Declaration of Taking also alleged that the land was to be taken under authority of the said Act of Feb. 26, 1931 [46 Stat. 1421, 40 U. S. C., Sec. 258 (a)] known as the Declaration of Taking Act (R. 74).

An order and judgment on said Declaration of Taking was entered by the District Court on April 9, 1941 (R. 79-83).

On April 7, 1941, the date of the filing of the aforesaid Declaration of Taking, the estimated compensation for the land involved in this case in the amount of $15,280.00 was deposited in the Registry of the Court (R. 78).

On April 9, 1941, the District Court ordered said sum of $15,280.00, the estimated compensation, transferred from case No. 770 to this case which bore District Court No. 800 (R. 84).

To this condemnation petition filed as aforesaid in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri this petitioner, being defendant in the said District Court, filed an answer on May 19, 1941 (R. 84-95), in which it alleged that it had entered into a contract in the form of an option granted to the United States to purchase the land involved for $52,000.00, which option was executed by it on Nov. 25, 1940, and accepted by the United States on Nov. 30, 1940. The petitioner, then defendant, set forth said option contract in full in said answer (R. 85-93) and alleged in substance that it had performed its obligations under said contract and that the United States had been granted possession of the land thereunder and had accepted same but had not paid the agreed consideration (R. 93 and 94) and prayed for a dismissal of the condemnation suit and for the setting aside of the order and judgment of taking (R. 95).

However, on April 2, 1945, this petitioner, then defendant in the District Court, by leave of court filed its amended answer in said District Court consenting to the condemnation proceeding and praying in substance that plaintiff's prayer for the fixing of the award for the value of the land in accordance with the report of three disinterested commissioners to be appointed by the Court be denied and that the award be fixed at $52,000.00, the agreed valuation of the land set forth in the contract, plus interest on the whole sum of $52,000.00 at the rate of 6% per annum from Nov. 30, 1940, the date of the surrender of possession, to April 9, 1941, the date of the payment of the estimated compensation into the Registry of the Court, plus interest on the difference between such estimated compensation and the $52,000.00 agreed valuation at 6% per annum from the date of the deposit of the estimated compensation to the date of the deposit of the additional amount in the Court Registry.

This option was given by this petitioner on Nov. 25, 1940, for a consideration of One Dollar ($1.00) and the landowner thereby agreed for that $1.00 consideration, if the option should be accepted by the United States within thirty days, to sell the land described therein to the United States for $52,000.00 (R. 85) and for the same $1.00 consideration this option granted to the United States the right of immediate occupancy and use of the land for any purpose whatsoever from and after acceptance of the option by the Government until such time as the land should be conveyed to the Government and the purchase price paid (R. 92).

Meanwhile, two other cases involving other lands in the same area and involving similar contracts were tried by the District Court. In both of these cases the defendants in their respective answers had prayed for the fixing of the award for the taking of the land at the agreed valuation in the contract and the defendant in one of the cases had prayed for the allowance of interest in the pleading upon which the case went to trial. In both cases the plaintiff had contended that the alleged contract was invalid.

Pending the final outcome of these two cases the United States had taken no further action in the case at bar or any of the numerous condemnation cases arising out of the Weldon Spring ordnance project.

The District Court, after trial of the two above mentioned cases, entered a decree in each of them holding the contract valid and fixing the award for the taking of the land at the agreed valuation set forth in the option contract and **allowing interest on the whole amount of the award from the date of the taking of possession to the date of payment of the estimated compensation into court and on the difference between the estimated compensation and the amount awarded from the date of the deposit of the estimated compensation to the date of payment of the amount of said difference.**

The plaintiff then had appealed to the United States Circuit Court of Appeals but had **utterly failed in its brief in that court to specify any error in the allowance of interest** but had directed its whole attack against the alleged invalidity of the contract. The Circuit Court of Appeals, in a joint opinion entitled United States v. Muschaney et al., and United States v. Andrews et al., 139 Fed. (2d) 661, had reversed the District Court in each case and had held that the respective contracts were invalid; whereupon the appellees in each case had applied for and been granted writs of certiorari by this Court and later this Court had in a joint opinion, being Muschaney v. United States and Andrews v. United States, 324 U. S. 49, reversed the Circuit Court of Appeals, holding the contracts valid and holding that the award for the value of the land should be fixed at the agreed valuation in the contract and had remanded the cases to the District Court with directions for further proceedings in accordance with the opinion of this Court. **Since the Government had failed in its appeal to present the interest question either to the Circuit Court of Appeals or to this Court,** both the Circuit Court of Appeals and this Court had naturally been silent on the subject of interest in their respective opinions.

Thereafter the United States, recognizing the validity of the option contract in view of the opinion of this Court in the Andrews and Muschaney cases, filed a motion for judgment in each similar condemnation case, including the case at bar, in which motion it cited the opinion of this Court in the Andrews and Muschaney cases above mentioned and prayed for judgment for plaintiff in condemnation and for the defendant for the contract valuation **without interest.** A motion of this character was filed in the case at bar on March 20, 1945 (R. 95).

On April 3, 1945, this petitioner, then defendant, filed a counter-motion for judgment for the plaintiff in condem-

nation and for the defendant for the contract valuation of $52,000.00 plus interest on said sum at the rate of 6% per annum on said amount from November 30, 1940, the date upon which it surrendered possession of the land, to April 9, 1941, the date upon which the estimated compensation was paid into court plus interest at said rate on the difference between said sum of Fifty-two Thousand Dollars ($52,000.00) and the amount of the estimated compensation paid into Court on April 9, 1941, for a period of time extending from said deposit date of April 9, 1941, to the date upon which said difference should be deposited in the Registry of the Court (R. 100-101), which said last mentioned date later turned out to be May 17, 1945 (R. 101-102).

This case, along with numerous other cases involving the same question, was heard on April 4, 1945. Each of the three District Judges, namely, Judge Moore, Judge Hulen and Judge Duncan, had some of these cases set for the last mentioned date, and in view of the similarity of the cases all three Judges sat together and heard the cases, but each Judge decided his own cases independently of the other two Judges.

The result was that Judges Moore and Duncan each reached a decision that the defendants **were entitled to interest on the difference between the amount of the estimated compensation and the amount of the final award based upon the agreed valuation in the contract for the period extending from the date of the deposit of the estimated compensation to the date upon which the said difference should be deposited, but that the defendants were not entitled to interest on the whole award from the date of the surrender of possession to the date of the deposit of the estimated compensation.** Judge Hulen decided in his cases that **no interest whatever should be awarded.** The case at bar happened to be one of the cases decided by Judge Duncan (R. 103-104). A decree in accordance with the above mentioned decision of Judge Duncan was entered

on November 26, 1945. This petitioner did not appeal from the disallowance of interest on the whole amount from the date of surrender of possession to the date of the deposit of the estimated compensation, but the United States did appeal to the Circuit Court of Appeals from the allowance of interest to the extent that it was allowed (R. 55). Said appeal was consolidated with three similar appeals and a joint record in all four appeals was compiled and printed (R. 287-288). Ten copies of this printed record are filed in this Court for use in connection with this petition and the other three petitions to which said joint record pertains. The four appeals were argued together before the Circuit Court of Appeals.

Meanwhile, an appeal of Lola Castlio Oliver and A. Ray Oliver, her husband, and Mrs. B. I. Castlio from the decision of Judge Hulen disallowing all interest in a similar case had been filed, perfected and submitted.

Thereafter, on April 9, 1946, the Circuit Court of Appeals rendered its decision and filed its opinion in said Oliver case, being case No. 13174 on the docket of the Circuit Court of Appeals of the Eighth Circuit, affirming the opinion of Judge Hulen which had disallowed interest (R. 296-303) and on the same day said Court entered a joint opinion reversing the District Court in this case and the other three cases with which it was jointly submitted and referring to the reasons given for not allowing interest embodied in the opinion in the Oliver case (R. 295-296).

At this point we call attention to the fact that the contract involved in this case, which was identical with the contract involved in all of the other cases, provided for the purchase and sale of the land by the parties thereto but provided for condemnation in the event it was deemed necessary for the purpose of clearing the title, and provided that in the event of such condemnation the award

should be fixed by a consent verdict at the **agreed valuation in the option** and that upon the filing of the petition a deposit of the **agreed amount** should be made with the Clerk of the Court (R. 92 and 93).

We also call attention to the fact that the Government went into possession **under the contract** and subsequently repudiated the contract and sought to acquire the land independently of the contract as shown by the opinion of the Circuit Court of Appeals at one point where it mentions the United States **as having repudiated its purchase contract** (R. 301) and at another point in its opinion where it mentions the fact that the United States did not proceed with condemnation proceedings **as contemplated by the purchase contract** but under the mistaken belief that the contract was void (R. 302).

This petitioner's petition for rehearing which had been filed in due time pursuant to the rules of the Circuit Court of Appeals (R. 323) was overruled by said Court on the 30th day of April, 1946 (R. 329).

A timely petition to stay the mandate of the Court for thirty days in order to permit this petitioner to apply to this Court for a writ of certiorari was sustained by the Circuit Court of Appeals by order entered on May 10, 1946 (R. 352).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Circuit Court of Appeals, is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides, in effect, that in

any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was originally entered on April 9, 1946 (R. 304-305). A petition for a rehearing was duly filed by petitioner, who was appellee in said Court, on April 24, 1946, within the time provided by the rules of said Court (R. 323), and said petition for a rehearing was denied by said Circuit Court of Appeals on the 30th day of April, 1946 (R. 329), which is the date on which the judgment of said Circuit Court of Appeals became final.

In said cause said petitioner specifically set up and claimed a right under the Constitution of the United States, being the just compensation provision of the Fifth Amendment thereto, and under the Statutes of the United States and particularly United States Code annotated, Title 40, Sec. 258(a), 258(e), which rights were denied by the decision and judgment of said Circuit Court of Appeals.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition for a writ of certiorari are:

1. Whether, as indicated by the opinion of the Circuit Court of Appeals (R. 301), in view of the fact that the agency of the Government acquiring the land for the United States was authorized to acquire it by purchase and that under such authority it entered into the contract involved in this proceeding (R. 85) and that that

contract provided for a purchase price of the land in the amount of $52,000.00 and also for the immediate possession of the land by the United States pending the accomplishment of the work of conveyancing and also, in the event of condemnation, for the immediate payment of the agreed valuation into the Registry of the Court upon filing the condemnation proceedings, the effect of such contract under all of these circumstances was to fix the total amount of all compensation to be received for the land at $52,000.00 with no interest for delayed payment regardless of the fact that the contract was violated and repudiated by the institution of a condemnation proceeding not in accordance with its terms and in defiance of its provisions for payment of the agreed valuation into the Court Registry at the time of the filing of the condemnation suit.

2. Whether the United States, by illegally repudiating the contract, forfeited its contract right to possession while remaining liable for the contract price and reacquired the right to possession and acquired the ownership of the property by virtue of a condemnation process under the Act of Feb. 26, 1931 [46 Stat. 1421, Title 40, U. S. C. 258 (a)] known as the Declaration of Taking Act, thereby rendering the provision of said Act for the payment of interest applicable.

3. Whether, even though the United States first acquired possession and the lawful right thereto under the option contract before it had repudiated same and continued to hold possession after it had by its Act in repudiating the contract forfeited the right thereto and until the entry of the order pursuant to the Declaration of Taking in the condemnation suit, it can now be heard to say that it did not acquire the land and the right to possession in an adversary condemnation proceeding.

4. Whether the United States, after bringing a condemnation suit in defiance of the terms of the contract and

after praying in its petition for the fixing of the award by commissioners rather than in accordance with the contract valuation and after paying into Court a different and less sum than the agreed valuation in the contract as estimated compensation, and after failing as provided by the contract in the event of condemnation to pay the agreed valuation into Court at the time of the institution of the proceeding, can at a later date convert the proceeding into a proceeding in conformity with the contract and thereby restore itself to all of the rights which it originally had under the contract, including the right to possession under the contract, by merely filing a motion to fix the award at the contract price and paying the contract price into court years after it should have been paid under the provisions of the contract.

5. Whether, as contended by the Circuit Court of Appeals (R. 301-302), the landowner, by insisting upon the validity of the purchase contract and upon its controlling effect upon the question of the compensation for the taking of the land as of the date of the taking, waived the right to interest set forth in the Declaration of Taking Act and the Fifth Amendment to the Constitution and thereby rendered the question of the allowance of interest in this proceeding determinable only by reference to the provisions of the contract itself.

6. Whether the mere fact that the award for the taking of the land in this proceeding was fixed in accordance with the agreed valuation in the contract instead of being fixed in accordance with a report of commissioners or a verdict of a jury prevents it from being true that just compensation for the land as of the date of the taking was "ascertained and awarded in said proceeding and established by judgment therein" within the meaning of the Declaration of Taking Act, being the Act of Feb. 26, 1931, Title 40 U. S. C., Sec. 258 (a), and therefore prevents the following provision of said Act:

"And the said judgment shall include, as part of the just compensation awarded, interest at the rate of six percentum per annum on the amount finally awarded as the value of the property as of the date of the taking, from said date to the date of payment"

from being applicable in this proceeding.

7. Whether the grant in the option of immediate possession of the land by the landowner to the Government upon the acceptance of the option was for the option consideration of One Dollar ($1.00) or was for the Fifty-two Thousand Dollar ($52,000.00) purchase price.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, by deciding in this case which is a condemnation case under the Declaration of Taking Act, being the Act of Feb. 26, 1931 (46 Stat. 1421), Title 40 U. S. C., Sec. 258a, among other Acts, that the landowner is not entitled to interest on that portion of the award not paid into Court at the time of the filing of the Declaration of Taking has rendered a decision in conflict with that Act, with the just compensation provision of the Fifth Amendment to the Constitution of the United States and with the applicable decisions of this Court which are cited hereunder.

Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13, 16;
Seaboard Air Line Railway Co. v. United States, 261 U. S. 299;
United States v. Rogers, 255 U. S. 163;
Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a;
Fifth Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals, by deciding that because in this case the agency of the Government intrusted with the acquisition of the land was authorized to purchase same and because the contract was entered into prior to the filing of this proceeding the effect of the contract here involved was to fix the net amount to be received by the landowner for the taking of the land and to exclude the payment of interest notwithstanding the fact that said contract contemplated possible condemnation and provided against delay in the payment of the agreed amount in the event of condemnation by providing that said amount should be paid into Court upon the filing of the condemnation proceeding and notwithstanding the fact that condemnation without reference to the contract and after repudiation thereof was resorted to, has decided an important question of Federal law with reference to Government land acquisition by the use of the condemnation process in conjunction with previously existing contracts as to the amount of compensation, which question has not been but should be settled by this Court.

3. The decision of the Circuit Court of Appeals to the effect that interest is not allowable in this proceeding on that portion of the award for the value of the land as of the date of the taking not paid at the date of the Declaration of Taking has denied petitioner a right which it has specifically set up under the Declaration of Taking Act and under the just compensation provision of the Fifth Amendment to the Constitution of the United States, the denial of which right can now be remedied only by the issuance by this Court of its writ of certiorari.

4. The decision of the Circuit Court of Appeals to the effect that because the consideration for the purchase of the land was fixed by a contract entered into before the condemnation suit was instituted the amount named as such consideration must be taken as the sole compensation

in the condemnation suit regardless of the date of the payment thereof, although the contract contemplated the possible condemnation and the Government had entered into possession of the land under the contract and then repudiated the contract and then filed this proceeding and a Declaration of Taking **is squarely in conflict with the opinion of the Circuit Court of Appeals for the Fifth Circuit in the case of United States v. Baugh, 149 Fed. 2d 190,** in which case **interest was allowed for the period of the delay in the payment of the award arrived at by the Court pursuant to an agreed valuation embodied in a stipulation between the parties** and in which case the Court held in substance that the landowner had the constitutional right to receive **not only compensation for the land as of the date of the taking, but where the taking precedes the payment, such addition as will produce the full equivalent of the value paid contemporaneously with the taking** and also held **that the settled law of the land at the time a contract is made is a part of the contract and must be read into it** and the doctrine of which case is contrary to the proposition that in a condemnation case of this character interest must be denied because of the general rule that interest does not run on contractual claims against the sovereign which proposition, according to the opinion in the Baugh case, was set forth in the only specification of error in the brief of the United States in said case. The conflict between the opinions of these two Circuit Court of Appeals has a tendency to create confusion as to the law and should, we respectfully submit, be terminated by a decision of this Court.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that the said opinion and judgment of said Circuit Court of Appeals in the case of United States of America, Appellant, v. Q. W. S. S. Realty and Investment Company, a Corporation, Appellee, No. 13226 in said Court, be reviewed by this Court as provided by law, and that upon such review said judgment be reversed and the petitioner have such other relief as to this Court may seem appropriate.

SAMUEL M. WATSON,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals in the within cause does not state the reasons for the Court's decision, but refers to the opinion in the Oliver case, a companion case. The opinion in this case may be found on pages 295 and 296 of the record, and the opinion in the Oliver case appears on pages 297 to 303 of the transcript of the printed record on file in connection with this and other cases.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari. Reference will be made to such facts where necessary in the course of this brief.

SPECIFICATIONS OF ERROR TO BE URGED.

1.

It was error for the Circuit Court of Appeals, after first proclaiming the sound proposition of law (R. 300-301), that where after a contract between the Government and a landowner made in contemplation of the acquisition of the land by condemnation and fixing the value of the land for that purpose, the United States acquires possession of the land in the contemplated condemnation proceeding and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of the taking until payment, in order that the constitutional requirement of just compensation may be satisfied (R. 300-301), **then to hold** that just compensation does not require payment of interest in **this proceeding** because of the fact that the acquiring agency was authorized to acquire the land by purchase and because of the further fact that the United States acquired possession under the contract, **basing its holding** upon the erroneous assumption that because the parties arrived at an agreed purchase price they did so without reference to just compensation in a constitutional sense and agreed upon the amount of the compensation **not as of the date of the taking**, but without reference to any date whatsoever and without reference to the question as to whether it should eventually be paid after a direct purchase or in the course of a condemnation proceeding which **erroneous assumption** did not take into consideration the fact that **possible acquisition of the land by condemnation was contemplated by the contract** (R. 92-93), and that **the contract provided against delay in payment** by providing that in the event of condemnation the **agreed valuation** of Fifty-two Thousand Dollars ($52,000.00) **should be paid into Court upon the filing of the suit**, and that although the United States

acquired possession under the contract and then retained possession it nevertheless acquired it for the option consideration of $1.00 and not for the Fifty-two Thousand Dollars ($52,000.00) agreed valuation and forfeited the right to possession by repudiating the contract and had to depend upon and resort to condemnation to **regain the right** to the possession which it was already enjoying.

II.

The Circuit Court of Appeals erred in saying: "The landowners are not entitled to insist upon the provisions of the contract favorable to them while rejecting others which are unfavorable" for the reason that said statement implies that the landowners, by insisting upon the payment of interest on the agreed valuation, are rejecting that portion of the contract which provides for immediate possession by the Government upon the acceptance of the option, whereas the landowner is not rejecting that provision but, on the contrary, the benefits thereof were forfeited by the Government by reason of the Government's repudiation of the contract while the landowners' rights to have the agreed valuation in the contract fixed as the value of the land at the date of the taking arises from the fact that the contract established said sum as the agreed valuation of the land (R. 93).

III.

The Circuit Court of Appeals erred in saying, "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States"

(R. 302) for the reason that the "exclusive possession and use from the effective date of the purchase contract until payment by the United States" was by the express terms of the option granted **for the consideration of One Dollar ($1.00) and not for the Fifty-two Thousand Dollar ($52,000.00) consideration** (R. 85, 92), although later forfeited by repudiation.

IV.

The Circuit Court of Appeals erred in holding as follows: "The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest to the United States by way of damages for delay in the payment of an obligation."

V.

The Circuit Court of Appeals erred in reversing the District Court and in entering judgment ordering the cause remanded to the District Court with directions to enter judgment in favor of the appellee Q. W. S. S. Realty & Investment Company for the consideration stipulated in the contract without interest.

SUMMARY OF THE ARGUMENT.

I.

Since the property involved in this proceeding was taken for public use and the payment for a portion of the value thereof was delayed beyond the date of the taking, just compensation as provided by the Fifth Amendment to the Constitution of the United States and by the Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a, requires that the value of the property as of the date of the taking and such additional amount as shall compensate the owner for the delay in payment of that portion not paid on the date of the taking be paid to the owner.

United States v. Rogers, 255 U. S. 163;
Danforth v. United States, 308 U. S. 271;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13.

II.

The fact that the contract involved in this proceeding was entered into prior to the filing of said proceeding and provided for either the acquisition of the land by purchase at an agreed valuation of $52,000.00 or acquisition of the land by condemnation at that figure and that the award of compensation for the land as of the date of the taking was fixed by the court in this proceeding at the agreed valuation contained in the contract, does not prevent the just compensation provision of the Fifth Amendment or Sec. 258 (a) of the Declaration of Taking Act from being applicable and does not prevent the agreed valuation named in the contract from being just compensation for

the land as of the date of the taking since condemnation was actually resorted to.

Contract between the United States and Q. W. S. S. Realty & Investment Company (R. 85-93);
Fifth Amendment to the Constitution of the United States;
Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C. A., Sec. 258 (a);
Danforth v. United States, 308 U. S. 271;
Muschaney v. United States, 324 U. S. 49.

III.

The Fifty-two Thousand Dollar ($52,000.00) sum mentioned in the contract was described therein as the agreed valuation of the land (R. 93) and was that only, and was not in part a consideration also for the grant of immediate possession to the United States as held by the Circuit Court of Appeals (R. 302), that grant having been included in the option before acceptance and conditioned to take effect immediately upon acceptance and before the payment of the Fifty-two Thousand Dollar sum, said option with all of the rights and privileges which it granted to the United States including the said right to possession from and after acceptance thereof having been made, executed and delivered for a valid consideration of One Dollar. The Government, however, forfeited this right to possession granted by the option by repudiating the option and bringing a condemnation suit, which suit was in contravention of the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93);
Opinion of the Circuit Court of Appeals (R. 296-303).

IV.

The said option mentioned above in our paragraph III also provided that in the event of the necessity for condemnation to clear title the land might be acquired by condemnation and that the Government should not be disturbed in its use and occupancy of the land during the pendency of the condemnation proceeding, and this provision was supported not by the Fifty-two Thousand Dollar agreed valuation but by the option consideration of $1.00. The Government, however, forfeited this right to be undisturbed in the use and occupancy of the land during the pendency of the condemnation proceeding by repudiating the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

V.

The contracting parties did not at the time of entrance into the contract contemplate delay in the payment of the agreed valuation, it being natural for them to assume that if title should prove to be satisfactory and if the land should therefore be acquired by purchase, the work of conveyancing would not give rise to an unreasonable delay, and they specifically provided against delay in case of condemnation by providing that in the event thereof the agreed valuation should be placed in the Registry of the Court upon the institution of the proceedings (R. 93).

Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

VI.

While ordinarily claims against the United States lying either in tort or in contract do not bear interest, this Court has often held that the claim of a defendant in a

condemnation proceeding by the United States for compensation for his property does not come within the scope of the rule that interest does not run against the sovereign. The question has never been decided by this Court, however, in a case such as this one in which the amount of the award as to the value of the land as of the date of the taking has been fixed by the court in accordance with a pre-existing agreed valuation in a contract between the parties.

United States v. Rogers, 255 U. S. 163;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, supra.

VII.

Petitioner's prayer in its answer filed in the District Court for the fixing of the award at the agreed valuation contained in the contract and its subsequent insistence thereupon did not amount to the institution and prosecution of a claim in contract against the United States but, on the contrary, was merely **defensive in its nature in a proceeding prosecuted by the United States**, the whole of which could have been dismissed by the United States at any time prior to judgment, and, in fact, **the jurisdiction of the District Court to entertain a claim on a contract is limited by statute to claims amounting to Ten Thousand Dollars or less.**

Tucker Act, Sec. 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

VIII.

The question as to whether interest runs against the United States in a condemnation proceeding in which the award of compensation for the land as of the date of the taking has been fixed in accordance with the agreed valuation contained in a contract between the parties has been

decided adversely by the Circuit Court of Appeals of the Fifth Circuit in the case of United States v. Baugh, 149 Fed. 2d 190, and the Circuit Court of Appeals of the Eighth Circuit in this proceeding and the companion proceedings. This we submit is a very important question of federal law not yet decided by this court which question by reason of the diversity of opinion of the two courts of appeals will create confusion unless and until decided by this Court.

United States v. Baugh, 149 Fed. 2d 190;
Opinion of Circuit Court of Appeals for the Eighth Circuit in the Oliver case (R. 296-303).

ARGUMENT.

I.

When property is taken for public use in a condemnation proceeding and a portion of the value thereof as of the date of the taking is delayed beyond the date of the taking, then such additional amount must be paid as shall compensate the condemnee for having been deprived of both the property and a portion of the money which should have been paid on the date of the taking from said date until the date of payment. No less will satisfy the just compensation provision of the Fifth Amendment to the Constitution. The Declaration of Taking Act of Feb. 26, 1931, 46 Sta.. 1421, c. 307, 40 U. S. C. A., Sec. 258a, has provided that such additional amount shall be measured by interest at the rate of Six Percent per annum on the unpaid portion from the date of the taking to the date of payment. That the foregoing is true requires no citation of authorities because it is admitted by the respondent and stated by the Circuit Court of Appeals in its opinion in the cases under consideration, and it is also stated in said opinion that this case proceeded under the authority of the aforesaid Declaration of Taking Act (R. 300).

II, III and IV.

The Circuit Court of Appeals also goes so far as to say that where a contract between the Government and a landowner contemplating the acquisition of the land by condemnation fixes the value of the land for that purpose and the Government acquires the land in the contemplated condemnation proceeding and fails to make payment of the agreed value contemporaneously with the taking, **interest must be allowed in order to satisfy the constitutional requirement of just compensation**; but the Court says in substance that such is not true in these cases for

the reason that the War Department was authorized to acquire the land by purchase and that under that circumstance the effect of the contract was to bind the parties to an arbitrary and fixed consideration without reference to just compensation in the constitutional sense (R. 301) and for the reason that the purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States.

We submit that these reasons given by the Circuit Court of Appeals for holding that the payment of interest is not required as a part of the just compensation in this case are inadequate. We contend that **since the contract contemplated possible condemnation, and since condemnation was actually resorted to, the fact that the Government had the authority to purchase the land is without significance** and we direct this Court's attention to the fact that the Fifty-two Thousand Dollar consideration was **for the land alone** and not partly for the exclusive possession and use of the land from the effective date of the purchase contract as said by the Circuit Court of Appeals for the reason that said grant of possession was made by the landowner **by the option supported by a consideration of One Dollar before the option was accepted,** although it was conditioned to take effect from and after the date of acceptance (R. 85-92). We also direct the Court's attention to the fact that the provision of the condemnation clause of the contract to the effect in substance that the Government shall not be disturbed in its use and occupancy of the land during the pendency of the condemnation proceeding **also rests on the $1.00 consideration and not on the $52,000.00 consideration,** said provisions having

been a part of the option which was granted to the United States **for a consideration of $1.00** (R. 85, 92, 93). Furthermore, the condemnation provision of the option describes the $52,000.00 consideration as **the agreed valuation** (R. 93).

V.

The Circuit Court of Appeals in its opinion said: "Delay in payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied." We submit that on the contrary the contract specifically provided against delay in payment of the agreed valuation in the event of condemnation by providing that **upon the institution of the proceeding the agreed valuation would be paid into the registry of the Court** (R. 92-93) and it was not apprehended that in the absence of the necessity for a condemnation suit to perfect title there would be any substantial delay in the process of conveyancing.

VI, VII and VIII.

While it is well established that on ordinary claims against the Government, interest does not run, this Court has often held that such rule does not apply in condemnation proceedings. Typical of these holdings is the doctrine expressed in the following quotation from United States v. Rogers, 255 U. S. 163:

> "Was there error in awarding the owners interest on the value of their land appropriated from the time of actual taking of same until compensation was made? It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end be subjected to the payment of interest (citing cases). In the present case the landowners did not sue upon a claim against the Government as was the fact in U. S. v. North American Transportation & Trading Co., 253 U. S. 330. The Government was seeking for purposes au-

thorized by statute to appropriate the lands and it had actually taken them; and it had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran. Having taken the lands of the defendants in error it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

This question however has never been directly decided by this Court in a case in which the award of compensation for the value of the land as of the date of the taking was made by the Court pursuant to an agreed valuation contained in a contract, although the opinion of this Court in Danforth v. United States, 308 U. S. 271, which was such a case, seems to indicate that interest would have been allowed in that case if there had been an actual taking which the Court held there had never been.

We submit, however, that even though the question has never happened to be decided in such a case, there is nevertheless no difference between an award based upon an agreed valuation in a contract and an award arrived at by reference of the question of value to commissioners or a jury which should justify different decisions of this question. This question has been decided diversely by the Circuit Court of Appeals of the Eighth Circuit in these cases and by the Circuit Court of Appeals of the Fifth Circuit in United States v. Baugh, 149 Fed. 2d 190. This diversity of decisions leaves this important question of federal law unsettled until settled by this Court.

We submit that the petitioner, by praying in its answer in the District Court for the fixing of the award at the agreed valuation, was not prosecuting a claim in contract, but was defending itself in an adversary condemnation suit instituted by the Government after repudiation of the contract. In fact, the landowners' effort to have the award fixed at the agreed valuation could have been defeated by the Government at any time by the dismissal of

the condemnation suit; and furthermore, the District Court did not have jurisdiction to entertain a suit on a contract for an amount in excess of $10,000.00 because its jurisdiction is so limited by the statute known as the Tucker Act, 28 U. S. C. A., Sec. 41 (20).

We submit that the Government, having repudiated the contract and having instituted a condemnation suit in violation of the provisions of the contract, lost all of its rights under the contract and subjected itself to all of the provisions of the condemnation law, including the provision for the payment of interest on delayed payments, and was still subject to the contract provision that the award of compensation for the taking of the land must be fixed at the agreed valuation.

In conclusion, we submit that the mere fact that the District Court in the condemnation proceeding determined the value of the land as of the date of the taking in accordance with the agreed valuation in a contract entered into by the parties before the condemnation proceeding was instituted, which contract contemplated possible condemnation and provided that in the event thereof a consent verdict should be entered for the agreed valuation, **did not prevent the just compensation from being determined in the proceeding within the meaning of the Declaration of Taking Act**, but, on the contrary, the parties consented that the value of the land should be determined in the proceeding to be in that amount.

Respectfully submitted,

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